Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 21, 1996

Mr. Julian W. Taylor, III
Assistant City Attorney
Law Office of Wallace Shaw, P.C.
P.O. Box 3073
Freeport, Texas 77542-3073

OR96-0998

Dear Mr. Taylor:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act. Your request was assigned ID# 39798.

The City of Freeport (the "city"), which you represent, received a written request for the training procedures that two specified officers have been exposed to while working for the city's police department relating to the apprehension or arrest of suspects and entry into a suspects' place of residence.[1] You have provided this office with a representative sample of the requested information, labeled "Exhibit F."[2] You contend that this information is excepted from disclosure by section 552.103 and 552.108 of the Government Code.

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[1]Although the requestor originally provided the city with a broader request, as a result of discussions between the requestor and the city, the requestor has agreed to narrow the scope of the request. *See* Gov't Code § 552.222(b) (governmental body may ask for clarification and discus with requestor how scope of request may be narrowed), *see also* Open Records Decision Nos. 563 (1990), 561 (1990). Thus, this opinion only considers the information deemed responsive to the narrowed request for information.

[2]In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Government Code § 552.301(b)(3) (governmental body may submit representative samples of information if voluminous amount of information was requested); *see also* Open Records Decisions Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 638 (1996), 551 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a). Open Records Decision No. 638 (1996).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 452 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. *Id.; see also* Open Records Decision Nos. 555 (1990), 346 (1982). Additionally, in Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a "notice of claim" letter *and* the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance or statute. However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

The requestor in this instance is an attorney who represents a client who was allegedly injured by one or more police officers employed by the city. Additionally, the requestor has sent a "Notice of Texas Tort Claims Act Claim" to the city that alleges injuries and damages "due to the negligence" of the city. The notice of claim letter further requests the city to forward the letter to the city's insurance company or attorney. Based on this evidence, this office concludes that the city has established that litigation is reasonably anticipated[3] and that the requested information relates to the anticipated litigation. Therefore, you may withhold the requested information under section 552.103.[4]

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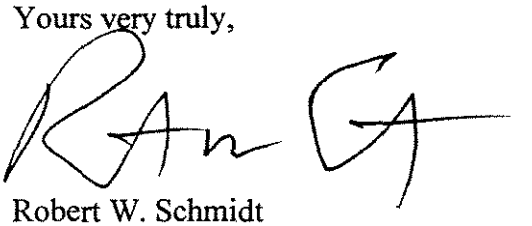
[3]The city did not make an affirmative representation that the notice of claim letter complies with the requirements of the TTCA, and thus has not met the test set forth in Open Records Decision No. 638 (1996) to determine that litigation is reasonably anticipated. Nonetheless, this office finds that based on the specific facts in this situation, the city has provided sufficient evidence to establish that litigation is reasonably anticipated under section 552.103 of the Government Code.

[4]Because we find that the city may withhold the requested information under section 552.103 of the Government Code, we do not address your contention that the information is excepted from disclosure under section 552.108.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue. Section 552.103 is intended to protect the litigation interests of a governmental body by forcing parties that are or may be in litigation with a governmental body to obtain information relating to the litigation through the discovery process, if at all. Open Records Decision No. 551 (1990) at 3. The litigation exception was intended to prevent the use of the Open Records Act as a method to avoid discovery rules. *Id.* at 4. In most circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and that information may not be withheld under this exception. *Id.; see also* Open Records Decision Nos. 454 (1986), 349 (1982), 320 (1982), 288 (1981). If the opposing party in this potential litigation has seen or had access to any of the information in these records, you may not withhold that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/rho

Ref.: ID# 39798

Enclosures: Submitted documents

cc: Ms. Dorra Bonner
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Clute, Texas 77531
(w/o enclosures)